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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE B. RIVAS,

Defendant and Appellant.

B207520

(Los Angeles County
Super. Ct. No. BA244067)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Sam Ohta, Judge. Affirmed.

Irma Castillo, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Jose B. Rivas appeals from the judgment entered following resentencing. Previously, he was convicted in count 1 of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 664/187, subd. (a)); in count 2 of corporal injury to a spouse (Pen. Code, § 273.5, subd. (a)); and in count 3 of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a).) With respect to counts 1 and 2, the jury found appellant personally used a deadly and dangerous weapon, a knife, within the meaning of Penal Code section 12022, subdivision (b)(1) and personally inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivision (e). He was sentenced to prison for life with the possibility of parole plus six years. The sentence was composed of, in count 1, a life term, plus the upper term of five years for the great bodily injury enhancement, and one year for the weapon enhancement. In count 2, appellant received a stayed prison sentence of the upper term of four years, plus five years for the great bodily injury enhancement, and one year for the weapon enhancement. In count 3, appellant was sentenced to a concurrent middle term of two years. On January 7, 2005, this court filed its opinion in case number B171183 reversing appellant's conviction for attempted willful, deliberate, and premeditated murder, leaving intact convictions in counts 2 and 3.¹

On December 17, 2007, the deputy district attorney informed the trial court that his office intended to retry appellant on count 1.

Appellant's *Marsden*² motion was heard and denied.

The retrial commenced on January 24, 2008.

¹ The evidence, briefly summarized, was that on March 1, 2003, appellant stabbed his victim several times in the presence of her young daughter. The victim suffered lacerations to her head, nose, right hand, left forearm, and left thigh. At the time appellant was arrested, he had four bindles of cocaine in his jacket pocket.

² *People v. Marsden* (1970) 2 Cal.3d 118.

On January 31, 2008, upon a finding that the jury was hopelessly deadlocked, the court declared a mistrial.

On March 20, 2008, the deputy district attorney advised the court his office was unable to proceed with count 1, and the motion pursuant to Penal Code section 1382 to dismiss count 1 was granted. The stay that was previously imposed on the sentence for count 2 was lifted and the sentence was put in full force and effect. The trial court reiterated the sentence, which was the high term of four years for count 2, plus the high term of five years for personal infliction of great bodily injury pursuant to Penal Code section 12022.7, subdivision (e), plus an additional one year pursuant to Penal Code section 12022, subdivision (b)(1) for the weapon enhancement.³

After review of the record, appellant's court-appointed counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436, 441.

On October 3, 2008, we advised appellant that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. No response has been received to date.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the

³ In the previous appeal, appellant urged that the sentence on count 2 be overturned because the trial court imposed the upper term after making factual findings in violation of *Blakely v. Washington* (2004) 542 U.S. 296. We agreed that *Blakely* applied but concluded any error was harmless. We observed the trial court "justified imposing the upper term on the fact that the crime was committed in the presence of a young child, Iroko. Although the jury was not asked to make a specific finding, Iroko was found running from apartment to apartment, beseeching the occupants for help, with blood on her hands. The evidence was clear that Iroko was present during the stabbing." (See *People v. Sandoval* (2007) 41 Cal.4th 825, 838.)

judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.